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No. 99-356

IN THE

Supreme Court of the United States

CITY OF JACKSONVILLE,

Petitioner,

v.

LADY J. LINGERIE, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The questions presented for this Court's review concern two distinct issues. First, the City seeks this Court's guidance in delineating the proper analytical framework to be employed when examining the constitutionality of local zoning regulations that regulate the permissible locations of adult entertainment businesses. Second, the City requests that this Court confirm the right of local planning officials to exercise more than a mere ministerial role when deciding whether a proposed land use involving protected speech is appropriate for a particular location, particularly where the speech at issue is entitled to only "marginal" protection.

Curiously, Respondents maintain that "[t]he lower courts are completely unified on this issue" (*i.e.*, which analysis to employ) and that this case does not present any questions of overriding public importance, "[g]iven the established nature of the legal issues." (Resp. Br. at 1). This position stands in stark contrast to that taken by Respondents before the Eleventh Circuit, where they stated:

> . . . This case presents a novel situation relative to the availability of sites for adult uses. . . . Although many cases have addressed the issue of *Freedman* standards as applied to adult uses and several cases have considered site availability where the sites can be utilized as of right, few or no cases have involved a situation which combines these issues.
>
> This Court has the opportunity to develop new law on this subject.

(Resp. Initial Br., Case No. 98-2207, 11th Cir., July 17, 1998).

As Respondents correctly argued in their initial position before the Eleventh Circuit, this case does, in fact, present an opportunity to develop new law on this subject. Namely,

the present state of the law is such that the lower courts are employing inconsistent analyses in examining the constitutionality of zoning provisions which regulate the permissible locations for adult entertainment businesses. This confusion has resulted in an irreconcilable conflict among the circuits, thereby necessitating the instant plea to this Court for authoritative guidance on the proper standard of review.

I. RESPONDENTS ERRONEOUSLY CONSTRUE THE CITY'S ARGUMENTS AS CALLING FOR AN ABOLITION OF THE PRIOR RESTRAINT ANALYSIS FOR ZONING REGULATIONS.

Contrary to the assertion of Respondents, the City does not maintain that "zoning laws are exempt from the prohibition against unlawful prior restraints." (Resp. Br. at 6). The questions presented for this Court's review do not entail an examination of *whether* the doctrine of prior restraint applies; rather, the questions presented seek guidance as to *which* prior restraint analysis governs the review of a local government's zoning scheme. If, as Respondents maintain, *FW/PBS* controls, then the courts must employ a two-pronged analysis to determine whether a zoning regulation constitutes an impermissible prior restraint. *See FW/PBS v. City of Dallas*, 493 U.S. 215 (1990). If, however, this Court agrees with the City that *Renton* controls, the prior restraint analysis is limited to a determination of whether the zoning criteria accord unbridled discretion to the decisionmakers. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

Under *FW/PBS*, a business licensing scheme must safeguard against both the potential for unbridled discretion and the opportunity for indefinite delay in the decisionmaking process. Under *Renton*, however, a content-neutral zoning scheme need not contain both of these safeguards. All that is

necessary under *Renton* is that the zoning regulations allow for a reasonable opportunity to communicate one's constitutionally protected message in alternative locations. By definition, a "reasonable" opportunity is one which does not entail the exercise of unbridled discretion in deciding whether a particular site is appropriate for the operation of an adult entertainment business.

This distinction is critical. If the zoning ordinance is examined as a time, place and manner regulatory scheme under *Renton*, it need not provide the full range of procedural safeguards required by *FW/PBS* for business licensing schemes. *See Marty's Adult World v. Town of Enfield*, 20 F.3d 512 (2d Cir. 1994) (citing *Freedman v. Maryland*, 380 U.S. 51 (1965)); *see also Charette v. Town of Oyster Bay*, 159 F.3d 749 (2d Cir. 1998); *Crown Street Enterprises, Inc. v. City of New Haven*, 989 F. Supp. 420 (D. Conn. 1997). This in no way eliminates the necessity of a prior restraint analysis; rather, it simply confines the courts' review to a determination of whether the zoning exception criteria accord unbridled discretion to the decisionmakers.

A. Respondents erroneously assert that the Second Circuit only employs the *Renton* analysis to examine the constitutionality of zoning regulations that require an exception solely for "surplus" sites.

Respondents dispute the City's contention that a conflict exists in the respective analyses employed by the Eleventh and Second Circuits for examining zoning ordinances that regulate the permissible locations for operating adult entertainment businesses. Although Respondents acknowledge that the Second Circuit has consistently applied the time, place and manner analysis of *Renton* to examine the constitutionality of zoning ordinances which regulate the permissible locations of adult entertainment businesses, they attempt to distinguish these cases as involving zoning schemes that required a special exception for sites that were

essentially "surplus" locations. (Resp. Br. at 3). According to Respondents, the courts employed the *Renton* time, place and manner analysis because "abundant" sites were available in other zoning districts which allowed for the operation of adult entertainment businesses as a matter of right.

Contrary to Respondents' representations, no such language is found in either *Marty's Adult World* or *Crown Street Enterprises*. Rather, the courts in both cases simply noted that adult entertainment businesses were allowed in at least one zoning district as a matter of right.[1] The cases are silent as to the precise number of sites that where actually available in those zoning districts. This is completely consistent with the City's position in the instant case; namely, that there is a dispositive distinction between business licensing schemes and zoning regulations in that the former determines *whether* the business may be conducted, regardless of its proposed location, while the latter simply prescribes *where* such activities are permissible. As aptly stated by the Second Circuit:

> The special use permit requirement that Marty's challenges is a content-neutral time, place and manner regulation, not a licensing scheme. . . . The special use permit requirement . . . is a time, place and manner regulation, since Marty's could operate elsewhere in Enfield without obtaining a special use permit. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46 (1986) (where a zoning ordinance does not ban an activity altogether, it should be analyzed as a time, place and manner regulation); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 75-76 (1981).

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1. Likewise, in the City of Jacksonville — just as in the City of New Haven and the Town of Enfield — adult entertainment businesses may operate as of right in at least one zoning district.

Marty's Adult World v. Town of Enfield, 20 F.3d 512, 515 (2d Cir. 1994).

In short, the Second Circuit never held that there were either "sufficient" or "abundant" sites available in other zoning districts where adult entertainment businesses could operate as a matter of right. No such pronouncement was necessary because the precise number of available sites is irrelevant for purposes of determining whether the *Renton* time, place and manner analysis applies. The precise number of available sites only becomes relevant *after* determining that the *Renton* analysis applies; that is, when analyzing whether the zoning scheme allows for reasonable alternative avenues of communication. *See Renton*, 475 U.S. at 932 ("In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city. . . .").

B. Respondents' characterization of the City's policy concerns as "hogwash" expressly conflicts with the high respect accorded by this Court to the interests of local governments in employing land use regulations to preserve the quality of urban life.

This Court has long-recognized that a "city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (Powell, J. concurring). Such attempts include utilizing "innovative land-use regulation, implicating First Amendment concerns only incidentally and to a limited extent." *Id.* at 73. Respondents, however, would relegate this interest in effective planning to mere "hogwash." (Resp. Br. at 8).

According to Respondents, "[t]here is nothing in the *Lady J. Lingerie* decision, or the dozens of cases like it, which in any way limit government's ability to zone and plan for

the benefit of its citizens." (Resp. Br. at 8). This assertion, however, is somewhat perplexing in light of Respondents' contention that "[a]ll a City need do is specify a sufficient number of locations or zones where adult businesses may operate as a matter of right." (Resp. Br. at 8). In other words, the decision below does much more than merely limit the ability of local governments to zone; it actually dictates *how* they are to zone. This Court has expressly rejected the notion that the First Amendment compels such a result:

> . . . Cities may regulate adult theaters by dispersing them, as in Detroit, or by effectively concentrating them, as in Renton. "It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas. . . ." *Renton*, 475 U.S. at 931 (quoting *American Mini Theatres*, 427 U.S. at 71).

The First Amendment simply does not preempt the discretion of local governments to decide the most appropriate location for a particular land use. Although concentrating the adverse secondary effects of adult entertainment businesses in a single "red light" zoning district may very well be appropriate for some locales, the First Amendment does not dictate such a result. The First Amendment functions as a shield against unlawful restraints of constitutionally protected expression; it was never intended to be wielded as a sword to dictate local planning decisions.

II. RESPONDENTS' CHARACTERIZATION OF THE *STEAKHOUSE* DECISION AS AN "ISOLATED CASE DECIDED ON UNUSUAL FACTS" FAILS TO ACCOUNT FOR THE FOURTH CIRCUIT'S PRIOR PRONOUNCEMENT ON THE ALLOWABLE DEGREE OF DISCRETION IN LOCAL PLANNING DECISIONS.

In *Steakhouse, Inc. v. City of Raleigh*, the Fourth Circuit Court of Appeals expressly acknowledged that the doctrine of prior restraint does not preclude local zoning boards from exercising a limited degree of discretion to "address the well-known variables inherent in any development . . ." 166 F.3d 634, 639 (4th Cir. 1999). Zoning exception criteria which channel the discretion of planning officials do not run afoul of the First Amendment, as such criteria force local zoning boards "to focus on concrete topics that generate palpable effects on the surrounding neighborhood." *Id.*

Respondents maintain that the *Steakhouse* decision is an isolated case decided on unusual facts and, moreover, that it does not truly conflict with the decision below. (Resp. Br. at 11). Both the history of the Fourth Circuit and the express language of the opinion below reveal otherwise.

The Fourth Circuit first recognized the fundamental differences between ministerial officers and planning officials some ten years prior to announcing its decision in *Steakhouse. 11126 Baltimore Blvd. v. Prince George's County*, 886 F.2d 1415 (4th Cir. 1989) ("*Baltimore Boulevard I*").[2] In *Baltimore Boulevard I*, the Fourth Circuit was called upon to review the trial court's decision that the county's

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2. This Court initially granted certiorari to review *Baltimore Boulevard*, but subsequently vacated the judgment of the Fourth Circuit and remanded the case for reconsideration in light of this Court's decision in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).

special exception criteria were unconstitutionally "vague and subject to possible manipulation and arbitrary application" by local officials. On appeal, the Fourth Circuit reversed. In so doing, the court expressly acknowledged that the First Amendment does, in fact, allow for more than mere ministerial discretion in local planning decisions:

> It is settled that any license or special exception requirement for a speech-related activity must contain narrow and definite standards to guide the authority granting approval. *See Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). We are persuaded by the language of the challenged ordinances, the evidence in the record, and Maryland case law that the special exception requirements adopted by Prince George's County do not confer unbridled discretion upon County Council and zoning administrators. The provisions under attack provide definite guidelines, consistent with the substantial and legitimate interests advanced by the County, which zoning officials must apply when determining whether to grant a conditional use or special exception permit. The special exception application may not be denied if the applicant meets the specified ordinance requirements by substantial evidence and there is no substantial evidence to the contrary. Thus, County officials are without boundless discretion in approving or rejecting special exception applications.

Id. at 1427.

The Eleventh Circuit, in contrast, relegates local planning decisions to a mere ministerial function. *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1362 (11th Cir. 1999) ("[V]irtually any amount of discretion beyond the merely ministerial is suspect."). This conclusion is in express

conflict with the decisions of the Fourth Circuit Court of Appeals. *See Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634 (4th Cir. 1999); *11126 Baltimore Blvd. v. Prince George's County*, 886 F.2d 1415 (4th Cir. 1989).

CONCLUSION

Contrary to Respondents' contentions, the questions presented by the decision below are precisely the types of issues that warrant this Court's certiorari review. Equating content-neutral zoning regulations with business licensing schemes is inconsistent with Supreme Court precedent, decisions of the Second Circuit and sound public policy. Moreover, denying local planning authorities the ability to exercise limited discretion in evaluating the appropriateness of a proposed land use does not comport either with the decisions of the Fourth Circuit or the fundamental purpose of the prior restraint doctrine to shield against the exercise of *unbridled* discretion.

This is a land use case, with merely incidental First Amendment implications involving a form of expression that is entitled to only "marginal" protection. Zoning decisions, unlike those of censorship boards and ministerial licensing officials, necessarily demand some degree of discretion. The object of zoning is not to suppress speech, but rather to preserve the quality of urban life by protecting against the potential adverse secondary effects of any given land use. In short, zoning decisions do not warrant the heightened procedural safeguards reserved for censorship and licensing decisions. The City respectfully requests that this Court reaffirm the high respect which it has historically accorded to what has been described as "the most essential function performed by local government"[3] — zoning.

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3. *Young v. American Mini-Theaters, Inc.*, 427 U.S. 50, 71 (1976) (Powell, J., concurring).

Respectfully submitted,

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